RAILWAY ASSETS CORP

v.

ELMSPARK HOLDING SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-03-113-96]
5 JUNE 1997

LANDLORD & TENANT: *Lease - Lessor not the owner of property - Whether lease invalid - Lease approbated by owner - Effect - Whether notices to quit valid - True intention of the parties - Whether lessee a trespasser - Whether must deliver vacant possession*

The appellant is the owner of all railway land located within Peninsular Malaysia including one office building situate in Brickfields, Kuala Lumpur ('the subject property'). By a letter dated 13 March 1993, Keretapi Tanah Melayu Berhad ('KTMB'), believing that it owned the subject property, leased the property to the first respondent who then sublet it to other tenants. The appellant sought to regain possession of the subject property and on 17 February 1994 it filed a suit against the respondents ('the first suit'). The appellant did not pursue the first suit to judgment but compromised it by entering into an agreement with the first respondent and KTMB on 7 November 1994. *Inter alia*, the agreement stipulated (i) that the first respondent would continue to pay rental to KTMB (ii) that the lease could be terminated by KTMB by giving the first respondent six months notice.

On 21 December 1994 KTMB served the first respondent with a notice of termination. However, soon thereafter, on 13 january 1995, the parties entered into a consent order wherefore it was agreed that the fourth respondent, instead of the first respondent, would pay the rental to KTMB.

Apparently, the notice of 21 December 1994 by KTMB was ignored by the first respondent who continued to occupy the subject property after the expiry thereof. On 31 July 1995 the appellant wrote to the first respondent giving it notice to quit and to deliver up vacant possession of the subject property. The first respondent and those holding under it did not comply and on 13 January 1996 the appellant commenced action ('the second suit') by which it claimed possession of the subject property on the ground that the first respondent and the other defendants were trespassers. The first respondent retorted by claiming for specific performance. The learned judge held that the respondents were

not trespassers because the notice to quit dated 21 December 1994 was invalid, as was the notice dated 31 July 1995, and consequently dismissed the second suit. The appellant appealed.

Held:
Per Gopal Sri Ram JCA

[1] The appeal must be resolved by reference to the totality of the circumstances that were presented to the trial judge in order to ascertain the intentions of the parties.

[2] KTMB had no business to deal with the subject property and had no capacity to convey any interest in the subject property to anyone on 13 March 1993. The original lease granted on 13 March 1993 by KTMB to the first respondent was not worth the paper it was written. Clearly, if the first suit had been prosecuted to judgment, the appellant's contention that the defendants thereto were all trespassers would have been made out.

[2a] By accepting the proposal made on 7 November 1994 by the first respondent, the appellant had approbated an invalid lease. It is clear that what the appellant, the first respondent and KTMB sought to do by the agreement of 7 November 1994 was to formalise and make valid an otherwise invalid transaction. The parties agreed that KTMB would continue to receive rentals but from 1 January 1995 and that the existing relationship shall be transposed from KTMB and the first respondent to the appellant and the first respondent as landlord and tenant.

[3] There is no merit in the argument that the consent order has given rise to a relationship of land lord and tenant as between the first respondent and the appellant. That could not have been the intention of the parties when they entered into the consent order.

[3a] The consent order was a mere consequence of the agreement already arrived at pursuant to the letter of November 7 1994. That order added nothing and created no new rights. And nor did it impose any new obligations apart from those set out in the agreement of 7 November 1994.

[4] The totality of the circumstances reveal that the parties had intended that the first respondent should have the original lease granted by KTMB only until 30 June 1995. That is the objective aim of the compromise arrived at as well as the subsequent events leading up to the second notice to quit dated 31 July 1995.

[4a] In the circumtances, KTMB's notice of 21 December 1994 was valid and effectual to terminate the relationship of landlord and tenant in respect of the lease granted to the first respondent. All that remained in the hands of the first respodnent on 1 January 1995 was the six months notice period.

[4b] It follows that the learned judge had misdirected himself on the evidence before him. Had the learned judge addressed himself correctly on the totality of the circumstances and had asked himself what the parties really intended, he would have come to the same conclusion as we have in this appeal. He was also wrong in looking at the matter in a narow fashion. Had he approached the question of construction in a broad and liberal fashion he would have realised that the parties intended the first respondent to have only six months notice period in their hands as of 1 January 1995.

[5] The language of the notice dated 31 July 1995 sufficiently complies with the law on the subject. It is settled that a monthly tenancy period of the notice to quit, in the absence of a special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy.

[5a] The notice of 31 July 1995 makes it plain that the first respondent had to deliver vacant possession on or before 1 September 1995. That notice was sufficient to determine the first respondent's monthly tenancy as at 31 August 1995. The monthly tenancy having been validly determined, the first respondent and all those holding under him were trespassers and under an obligation to deliver up vacant possession to the appellant.

[6] The learned judge ought to have granted the relief claimed by the appellant in its writ in the second suit. And since the notices to quit are valid, no question of success upon the counter claim could possibly arise and it should be dismissed.

[Appeal allowed; counter claim dismissed; order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

TUANTANAH & PENYEWA: *Pajakan - Pemberi pajak bukan tuanpunya hartanah - Samada pajakan sah - Pajakan diperakui oleh tuanpunya - Kesan - Samada notis keluar sah - Niat sebenar pihak-pihak - Samada penerima pajak penceroboh - Samada harus mengembalikan milikan kosong*

Perayu adalah tuanpunya tanah-tanah keretapi yang terletak di Semenanjung Malaysia termasuk satu bangunan pejabat di Brickfields, Kuala Lumpur ('hartanah tersebut'). Melalui surat bertarikh 13 Mac 1993, Keretapi Tanah Melayu Berhad ('KTMB'), yang menyangka hartanah tersebut adalah miliknya, telah memajak hartanah tersebut kepada responden pertama, yang selepas itu menyewakannya pula kepada beberapa penyewa lain. Perayu berhasrat untuk mendapat kembali milikan hartanah tersebut dan telah memfailkan tuntutan terhadap responden pertama pada 17 Februari 1994 ('tuntutan pertama'). Perayu tidak meneruskan tuntutan pertama hingga selesai, tetapi telah berkompromi dengan responden pertama dan KTMB melalui satu perjanjian bertarikh 7 November 1994. Perjanjian ini antara lain menetapkan (i) bahawa responden pertama akan terus membayar sewa kepada KTMB (ii) bahawa pajakan berkenaan boleh ditamatkan oleh KTMB dengan memberi enam bulan notis kepada responden pertama.

Pada 21 Disember 1994 KTMB telah menyerahkan notis penamatan kepada responden pertama. Bagaimanapun, sejurus selepas itu, pada 13 Januari 1995, pihak-pihak terbabit telah memeterai satu perintah persetujuan dimana telah dipersetujui, di antara lainnya, bahawa responden keempat, sebagai ganti responden pertama, akan membayar sewa kepada KTMB.

Notis 21 Disember 1994 yang dikeluarkan oleh KTMB telah tidak diendahkan oleh responden pertama yang terus menduduki hartanah tersebut selepas notis tersebut tamat. Pada 31 Julai 1995 perayu memberi notis keluar kepada responden pertama sekaligus memintanya mengembalikan milikan kosong hartanah tersebut. Responden pertama dan penyewa-penyewa di bawahnya masih enggan keluar dan pada 13 Januari 1996 perayu memulakan tindakan ('tuntutan kedua') menuntut milikan kosong hartanah tersebut atas alasan bahawa responden dan defendan-defendan terlibat adalah penceroboh. Responden pertama membalas dengan memohon pelaksanaan spesifik. Hakim yang bijaksana memutuskan bahawa responden-responden bukanlah penceroboh oleh kerana kedua-dua notis keluar bertarikh 21 Disember 1994 dan 31 Julai 1995 adalah tak sah, dan dengan itu menolak tuntutan kedua. Perayu merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Rayuan di sini mestilah diputuskan dengan mengambilkira keseluruhan halkeadaan yang dibentangkan di hadapan Hakim perbicaraan bagi menentukan niat pihak-pihak yang terbabit.

[2] KTMB tidak berhak untuk berurusan dengan hartanah tersebut dan tidak mempunyai kapasiti untuk menganugerahkan apa-apa kepentingan di dalam hartanah tersebut kepada sesiapa pada 13 Mac 1993. Pajakan asal

yang dimeterai oleh KTMB pada 13 Mac 1993 dengan responden pertama adalah langsung tidak bernilai. Adalah jelas bahawa sekiranya tuntutan pertama diteruskan hingga ke akhirnya, penegasan perayu bahawa defendan-defendan adalah penceroboh akan dapat dibuktikan.

[2a] Dengan menerima cadangan yang dibuat oleh responden pertama pada 7 November 1994, perayu telah memperakukan satu pajakan yang tak sah. Adalah jelas bahawa apa yang diinginkan oleh perayu, responden pertama dan KTMB melalui perjanjian 7 November 1994 itu adalah untuk mengesahkan satu transaksi yang sebelumnya tak sah. Pihak-pihak tersebut bersetuju KTMB akan terus menerima bayaran sewa tetapi bermula 1 Januari 1995 dan bahawa hubungan yang wujud itu beralih dari perhubungan di antara KTMB dan responden pertama kepada perhubungan di antara perayu dan responden pertama masing-masing sebagai tuantanah dan penyewa.

[3] Hujah bahawa perintah persetujuan telah membangkitkan perhubungan tuantanah dan penyewa di antara perayu dan responden pertama adalah tidak bermerit. Ini tidak mungkin menjadi tujuan pihak-pihak terbabit apabila mereka memeterai perintah persetujuan tersebut.

[3a] Perintah persetujuan tersebut hanyalah satu akibat dari perjanjian yang telah pun dimeterai ekoran surat bertarikh 7 November 1994. Perintah tersebut tidak menambah apa-apa dan tidak membangkitkan hak-hak yang baru. Ia tidak mebentangkan apa-apa obligasi baru selain dari apa yang dibentangkan oleh perjanjian 7 November 1994.

[4] Keseluruhan halkeadaan kes menunjukkan bahawa pihak-pihak terbabit berniat bahawa responden pertama harus memperolehi pajakan asal yang diberikan oleh KTMB hanya setakat 30 Jun 1995. Inilah tujuan objektif yang terserlah dari kompromi yang dicapai dan dari peristiwa-peritiwa yang berlaku selepas itu sehingga kepada notis keluar kedua bertarikh 31 Julai 1995.

[4a] Dalam halkeadaan sedemikian, notis KTMB bertarikh 21 Disember 1994 adalah sah dan berkesan untuk menamatkan hubungan tuantanah dan penyewa berkaitan dengan pajakan yang diberikan kepada responden pertama.

[4b] Ianya mengikut bahawa Hakim yang bijaksana telah tersalah-arah dirinya sendiri atas keterangan yang ada di hadapannya. Jika Hakim yang bijaksana mengarahkah dirinya dengan betul di atas keseluruhan halkeadaan kes dan bertanyakan dirinya apakah sebenarnya yang diniatkan oleh pihak-pihak terbabit, beliau tentu akan mencapai keputusan yang sama sepertimana yang dicapai oleh kami di sini. Beliau juga silap

apabila melihat kepada halperkara dari sudut yang sempit. Jika beliau mendekati persoalan pentafsiran dengan cara yang liberal dan terbuka beliau pasti akan sedar bahawa pihak-pihak di sini berniat bahawa setakat 1 Januari 1995 responden pertama hanya mempunyai tempoh enam bulan notis di tangannya.

[5] Bahasa yang digunakan dalam notis 31 Julai 1995 mematuhi secukupnya keperluan undang-undang yang berkenaan. Adalah jelas bahawa tempoh notis keluar bagi satu penyewaan bulanan, dalam ketiadaan apa-apa perjanjian khas, mestilah selari dengan tempoh penyewaan dan mestilah tamat di akhir tempoh sebulan dari tarikh ianya bermula.

[5a] Notis 31 Julai 1995 menggambarkan dengan jelas bahawa responden pertama harus menyerahkan milikan kosong pada atau sebelum 1 September 1995. Notis tersebut adalah mencukupi untuk menamatkan penyewaan bulanan responden pertama pada 31 Ogos 1995. Oleh kerana penyewaan bulan tersebut ditamatkan dengan sahnya, maka responden pertama dan semua yang bertahan di bawahnya adalah penceroboh dan dengan itu bertanggungan untuk menyerahkan milikan kosong kepada perayu.

[6] Hakim yang bijaksana sepatutnya membenarkan relif yang dipohon perayu di dalam writ tuntutan keduanya. Dan oleh kerana notis-notis keluar di sini sah, soal berjaya tidaknya tuntutan balas responden tidak timbul dan patut ditolak.

[Rayuan dibenarkan. Tuntutan balas ditolak. Perintah sekadarnya.]

Cases referred to:
J Selvam & Anor v. S Mehta & Anor [1981] 2 MLJ 45 ***(refd)***
St Edmundsbury & Ipswich Diocesan Board of Finance & Clark (No. 2) [1975] 1 WLR 468 ***(foll)***
Prenn v. Simmonds [1971] 1 WLR 1381 ***(foll)***
Reardon Smith Line v. Ynguan Hansen-Tangen [1976] 1 WLR 989 ***(foll)***
Ko Teck Kin v. Watkinson [1961] 2 MLJ 73 ***(foll)***

Legislation referred to:
Railways Act 1991, ss. 89(1), 93
Rules of the High Court 1980, O. 15 r. 3(2)

For the appellant - Haris Mohd Ibrahim; M/s Adam & Co
For the 1st & 2nd respondents - RR Sethu (TC Tan with him); M/s Raja Eleena, Siew, Ang & Tan
For the 6th & 7th respondents - Azhar Azizan Harun; M/s Azhar & Goh

a

JUDGMENT

Gopal Sri Ram JCA:

Until 1991 all railway land situated within Semenanjung Malaysia was vested in the Federal Lands Commissioner by virtue of a lease in his favour granted b him by the Federal Government. In that year Parliament passed the Railways Act 1991 ('the Act'). The Act for the purpose of the present appeal made two important changes. First, it created the appellant. This it did by s. 89(1), which reads as follows:

c

> 89(1) There shall be established a body corporate by the name of "Railway Assets Corporation" (hereinafter referred to as 'the corporation') with perpetual succession and a common seal and may be sued in its name and subject to and for the purposes of this Act, may enter into contracts, and may acquire, purchase, take hold and enjoy moveable and immovable property of every description and may convey, assign, surrender, yield d up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any moveable or immovable property or any interest therein vested, the corporation upon such terms as it deems fit.

Secondly, by s. 93, the Act vested all railway land in the appellant. The section is in the following terms:

e

> 93. All property vested in, held or acquired by the Federal Lands Commissioner under the repealed ordinance shall vest in the corporation under this Act without any conveyance, assignment or transfer whatsoever for the like title, estate, or interest and on the like tenure as the same was vested or held immediately before the commencement of this Act f and all references to the "Federal Lands Commissioner" in relation to such property in any instrument, deed, title, document or written law shall be construed as if all such references were references to the "Railway Assets Corporation".

The appellant is therefore the owner of all railway land located within g Semenanjung Malaysia.

Keretapi Tanah Melayu Berhad ('KTMB') is a public listed company formed under the auspices of the Government of Malaysia. It has only one shareholder. He is the Minister of Finance for the Federation. KTMB was formed in 1992 for the purpose of conducting rail transport within Semenanjung Malaysia. h

All these things were done in order to privatise rail transport and in order to give effect to the privatisation policy of the elected Government.

Among the lands owned by the appellant is a property located in Brickfields. i It is a four-storey office building ('the subject property').

On 13 March 1993, KTMB under the erroneous assumption that it owned the subject property leased it to the first respondent for eight years and seven months. There was no formal lease drawn up and executed. It was merely in the form of a letter setting out the terms on which the lease was proposed. There was therefore no registered lease under the National Land Code 1965.

Sometime after that, the appellant became aware of the lease by KTMB of the subject property to the first respondent. It had not agreed to the grant of this lease at all. It wanted to recover possession. In the meantime, however, the first respondent had sublet various parts of the subject property to the other subtenants. In order to recover possession the appellant launched Civil Suit No: S5-22-77-94 on 17 February 1994. The first and second respondents before us were defendants to that action. I will call it "the first suit". There were also other defendants to the first suit who are not before us and with whom we are not concerned.

Following the institution of the first suit, the first respondent on 7 November 1994 wrote a letter addressed to "KTMB and/or Railway Assets Corporation" (the appellant). It is a very important document. For that reason I would reproduce it here in full. This is what it says:

> Dear Sirs,
>
> Re: i) Letting of land known as Lots 203(iv) And (v) Section 72, Bandar dan Daerah Kuala Lumpur together with four (4) storey office building thereon;
>
> ii) High Court Kuala Lumpur Suit No: S5-22-77-94 RAC -vs- Eurotwice (M) Sdn Bhd and 8 Others
>
> We refer to the above matter and the several discussions between En. Mahmud Hashim and En. Zainuddin.
>
> As requested, we now write on a strictly without prejudice basis to propose settlement in the following terms:
>
> We will pay to KTM Berhad the sum of RM92,902 as compensation for the letting of the above premises and which sum shall be payable as follows:
>
> (a) the sum of M65,457.66 immediately upon your confirmation of the terms herein; and
>
> (b) the balance sum of RM27,464.34 will be paid to you within seven (7) days from the date of consent order being entered in respect of the above payment only;

(c) we will pay to you a further sum of RM39,677 being rental assessment and quit rent calculated until 31 December 1994 within thirty (30) days from the date of payment of the sum referred to in para. 2.1(b) above;

(d) we will pay to M/s. Adam & Co. within seven (7) days from the date of the aforesaid consent order the sum of RM13,125 being full and final settlement of the legal fees of the above suit;

(e) you shall cause a consent order to be entered on 22 December 1994 in respect of the above payments by us to you only. Save and except for the 6th and 7th defendants, we and the other defendants will waive any and all claims which we may have against you in respect of the above suit. Further, we will indemnify you for all taxed costs that may be incurred in respect of your withdrawal of the above suit against the 6th, 7th and 8th defendants.

We will starting from 1 January 1995 pay to you monthly rental of RM7,000 inclusive of car park assessment and quit rent. Apart from the above, we confirm that all other terms and conditions as contained in your letter to us dated 13 March 1993 shall remain the same. We will settle directly with M/s. Skrine & Co. the legal fees in respect of the lease agreement.

Kindly confirm your acceptance to the above terms.

(Signed)

It may be noted that para. 2.4 of the foregoing letter requires the consent order to be entered on 22 December 1994. That is because the first suit was coming up for disposal on that date.

The proposal set out in the letter quoted above were accepted by both KTMB and the appellant. When the acceptance took place, it is not known. But all counsel before us are agreed that it must have taken place around that date that is to say 7 November 1994.

The consent order which para. 2.4 speaks of was not entered on 22 December 1994 because the hearing of the suit was adjourned to 13 January 1995. However, between 7 November 1994 and 13 January 1995 another important event took place.

On 21 December 1994 KTMB wrote to the first respondent giving it notice of termination pursuant to the provisions of cl. 15 appearing in the letter of 13 March 1993. That clause is in the following terms:

KTM Berhad berhak pada bila-bila masa menamatkan pajakan (sebelum tamat pajakan) dengan pembelian notis selama enam bulan kepada pihak tuan jika sekiranya tapak tersebut dikehendaki untuk maksud pembangunan oleh KTM Berhad dan ujudnya bangunan yang ada sekarang menghalang perlaksanaan projek tersebut.

This clause enables KTMB to recover possession by giving six months notice in the event:

(1) the subject property is required for the purpose of development by KTMB, and

(2) the subject property stands in the way of the proposed development.

The next event of significance occurred on 13 January 1995. On that date, counsel appeared before Mr. Justice Mokhtar Sidin J (as he then was) and recorded a consent order, the material paragraphs of which read as follows:

1. Defendan keempat akan membayar kepada Keretapi Tanah Melayu Berhad (selepas ini dirujuki sebagai 'KTMB') jumlah-jumlah berikut:

   (a) RM92,902 (selepas ini dirujuki sebagai 'jumlah pertama') di mana sebahagian jumlah pertama berjumlah RM65,437.66 sudah dibayar dan defendan keempat dikehendaki membayar baki jumlah pertama berjumlah RM27,464.34 dalam masa tujuh (7) hari dari tarikh perintah ini; dan

   (b) RM39,677 dalam masa 30 hari dari tarikh tamatnya tempoh yang dipersetujui untuk pembayaran baki jumlah pertama.

2. Defendan keempat akan membayar kepada Tetuan Adam & Co. kos tindakan ini yang dipersetujui berjumlah RM13,125 dalam masa 7 hari dari tarikh perintah ini.

3. Defendan keempat akan membayar segala yuran guaman yang dikenakan oleh Tetuan Skrine & Co. berkenaan perjanjian pajakan mengenai Lot 203, Seksyen 72, Bandar dan Daerah Kuala Lumpur termasuk sebuah bangunan empat tingkat (selepas ini dirujuki sebagai 'hartanah tersebut').

4. Mulai 1 Januari 1995 defendan keempat akan membayar kepada KTMB sewa bulanan termasuklah taksiran dan cukai pintu kesemuanya berjumlah RM7,000 sebulan (selepas ini dirujuki sebagai 'sewa tersebut') dan sebagai balasannya plaintiff akan membenarkan defendan keempat menghuni hartanah tersebut tertakluk dan terikat kepada semua terma-terma yang terkandung di dalam surat KTMB kepada defendan keempat bertarikh 13 Mac 1993, kecuali dan melainkan terma yang terkandung di dalam surat tersebut yang menetapkan jumlah sewa bulan.

5. Sekiranya defendan keempat memungkiri atau gagal mematuhi perintah dalam apa cara juga maka dalam keadaan sedemikian defendan keempat diwajibkan secara serta-merta menyerahkan kepada plaintif milikan kosong akan hartanah tersebut dan plaintif adalah bebas untuk membawa prosiding perlaksanaan untuk menguatkuasakan perintah ini.

On 31 July 1995 the appellant wrote to the first respondent giving it notice to quit and deliver up vacant possession of the subject property. I will not paraphrase that letter. Since its validity is in question I will reproduce it in full. This is what it says:

> We act for Railway Assets Corporation of 2nd Floor, Block B, Wisma Semantan, Jalan Gelenggang, 50490 Kuala Lumpur.
>
> We are instructed that you are currently in occupation of the above-mentioned property pursuant to a letting granted unto you by our client.
>
> We are now instructed to state that the above-mentioned property has been earmarked for redevelopment in line with approved plans to redevelop the Brickfields area.
>
> Upon instructions, and in accordance with the terms of the said letting, we hereby give you one (1) month's notice, commencing 1 August 1995 that the said letting is terminated and that you are to deliver up vacant possession of the said property to our client on or before 1 September 1995.
>
> Take notice that in the event you do not deliver up vacant possession of the said property by the aforesaid date, we have our client's instructions to commence legal proceedings for the recovery of the same without further reference to you, in which latter event you will be further liable for the costs occasioned thereby.

The first respondent and those holding under it did not comply with this notice. So, on 13 January 1996 the appellant commenced action ('the second suit') which forms the subject matter of this appeal today. In the second suit the appellant claimed vacant possession on the ground that the first respondent and the other defendants, all of whom are subtenants, were trespassers.

The defendants to the second suit delivered their defences. The first defendant (the first respondent before us) also delivered a counterclaim in which it sought specific enforcement of the lease granted as against the appellant and/or KTMB. I express my surprise at this claim for specific enforcement against KTMB because KTMB was not a party to the second suit. And nothing has been shown to this court to satisfy us that an application to join it as a defendant to the second suit or a defendant to the counterclaim was ever made. However, KTMB was added as a third party to the second suit. That, however, was unnecessary because of the provisions of O. 15 r. 3(2) Rules of the High Court 1980 which reads as follows:

> Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party

to the action, becomes a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.

The second suit came on for hearing before the High Court on 19 November 1996. It was heard over three days. counsel put in a written note of their submissions. The learned trial judge, at the conclusion of oral argument, dismissed the appellant's claim. He resolved all issues against the appellant. For purposes of the present appeal we will confine ourselves to only one of the grounds upon which the learned judge dismissed the action. He held that the first respondent and the other defendants were not trespassers because the notice to quit dated 21 December 1994 was invalid, as was the notice dated 31 July 1995. Unfortunately, however, the learned judge did not deal with or dispose of the first respondent's counterclaim.

Against this decision the appellant appealed to this court. When the appeal came on for hearing before us on 13 May 1997, Encik Haris Mohd. Ibrahim of counsel for the appellants informed us that the second suit had been discontinued against the third and eighth defendants in the court below. The notice of appeal had nevertheless been directed against them. He therefore orally applied to amend the notice of appeal by deleting the names of these two defendants. There being no opposition to that application, we granted it. In the course of arguments it transpired that the fourth and fifth respondents before us had also vacated the subject property. Encik Haris accordingly sought our leave to discontinue the appeal against these respondents. We allowed the discontinuance, dismissed the appeal against the fourth and fifth respondents and by consent of counsel fixed costs in their favour at RM2,000. For completion, I would add we heard this appeal on 13 and 14 May 1997, but the arguments not having been completed we adjourned it to yesterday and again to today.

The sole issue in this appeal is whether the remaining respondents before us, that is to say the first, second and seventh respondents are trespassers in respect of the subject property. The appellant argues that they are. The respondents (which expression hereafter will be used to refer to the remaining respondents before us) argued that they are not trespassers. The learned judge accepted the respondents' contention and held them to be in lawful occupation of the subject property.

It is beyond dispute that whether the respondents are trespassers or in lawful occupation is a question that depends for its resolution upon the validity of the two notices to quit I referred to earlier in this judgment. It is that question to which I now address myself.

For the respondents, Mr. R.R. Sethu of counsel has argued that the notices to quit in question are invalid because the appellant had granted a fresh lease for the remaining period with effect from 1 January 1995. The lease with KTMB was at an end 31 December 1994. The consent order of 13 January 1995 makes no reference to the notice given by KTMB on 21 December 1994. That notice was therefore spent. If the appellant wanted to have possession under cl. 15, it had to issue a fresh notice. When the notice of 31 June 1995 was issued, the first respondent was not a monthly tenant. That notice was therefore ineffective. This, in summary is the argument advanced in opposition to the appeal.

Encik Haris has, in support of the appeal, argued that we ought to hearken to the chronology and the circumstances that led to the institution of the second suit. He says that no new lease had been created between his client and the first respondent with effect from 1 January 1995. His argument is that the first respondent after 21 December 1994 had merely six months of the original lease in its hands. That lease expired on 30 June 1995. Thereafter the first respondent became a monthly tenant. The notice dated 31 July 1995 properly determined the monthly tenancy. With effect from 1 September 1995 the first respondent and all those holding under him were trespassers. So much for Encik Haris' submissions.

I am of the opinion that this appeal must be resolved by reference to the totality of the circumstances that were presented to the trial judge in order to ascertain the intentions of the parties. I shall therefore begin with the original purported grant by KTMB on 13 March 1993. KTMB was not the owner and has no right whatsoever over the subject property. As pointed out by my learned brother Abu Mansor JCA in the course of argument, it had no business to deal with and had no capacity to convey any interest in the subject property to anyone on 13 March 1993. He who does not have cannot give. It follows that if the first suit had been prosecuted to judgment the appellant's contention that the defendants thereto were all trespassers would have been made out.

But that did not happen. Against the advice of their solicitors given on 10 August 1994, the appellant insisted on compromising the first action in the tripartite agreement contained in the letter of 7 November 1994.

Mr. R.R. Sethu has sought to argue that it would be wrong to describe the grant by KTMB to the first respondent as a nullity. He submits that a non-owner can create a tenancy over immovable property. As authority for that proposition he has cited to us the decision of Abdul Hamid FJ (later Chief Justice of Malaysia) in *J. Selvam & Anor. v. S. Mehta & Anor.* [1981] 2 MLJ 45.

With respect, we are unable to agree with Mr. Sethu's argument. The decision in *J. Selvam & Anor. v. S. Metha & Anor. (supra)* is not authority for the proposition that a non-owner can create a valid lease or tenancy over a third party's land. In that case, the tenancy in question had been granted by the chief tenant of premises, and it is trite that a chief tenant has, in the absence of a covenant against subletting or assignment sufficient interest in the premises he occupies, to pass to another. A complete stranger who has no interest whatsoever in land has no title or interest to pass to anyone. In my view therefore the original lease granted on 13 March 1993 by KTMB to the first respondent was not worth the paper on which it was written. If the matter had rested there no difficulty would have arisen.

However, by accepting the proposal made on 7 November 1994 by the first respondent, the appellant had approbated an invalid lease. It is clear to my mind that what these three entities – the appellant, the first respondent and KTMB – sought to do by the agreement of 7 November 1994, was to formalise and make valid an otherwise invalid transaction so that the apple cart will not be upset. The parties agreed that KTMB would continue to receive rentals but from 1 January 1995 and that the existing relationship shall be transposed from KTMB and the first respondent to the appellant and the first respondent as landlord and tenant.

That brings me to the consent order. The question for me to decide is whether the consent order is a separate instrument standing apart from the agreement of 7 November 1994 or whether it was a mere consequential document. If as contended by Mr. Sethu, the consent order is the source of the relationship of landlord and tenant created afresh from 1 January 1995 between the appellant and the first respondent, it must follow that a fresh notice would have to be given. That is because the notice earlier given on 21 December 1994 would have been subsumed by consent order.

With respect I do not think that the parties intended such a consequence. As pointed out earlier in this judgment, para. 2.4 of 7 November 1994 agreement requires a consent order to be entered in the first suit. Mr. Sethu's argument that para. 4 of the consent order is different from the agreement arrived at pursuant to the letter of 7 November 1994 is, with respect, without merit. I am entirely in agreement with Encik Haris' submission that the consent order was a mere consequence of the agreement arrived at pursuant to the letter of 7 November 1994. That order added nothing. It created no new rights. Nor did it impose any new obligations apart from those set out in the agreement of 7 November 1994.

The fact that the consent order makes no mention of the notice to quit by KTMB dated 21 December 1994 takes the case no further for the respondents. It must be borne in mind that if that notice was not within the framework of what the parties had in their minds, one would have reasonably expected the first and the second respondents to have proclaimed their anger at the issuing of that notice followed by their refusal to have anything to do with the entering of the consent order.

The totality of the circumstances, when viewed as a whole, reveal that the parties intended that the first respondent should have the original lease granted by KTMB only until 30 June 1995. That, in my judgment, is the objective aim of the compromise arrived at as well as the subsequent events leading up to the second notice to quit dated 31 July 1995. The documentary evidence made available in the record provided to us demonstrates that the first respondent was in the habit of taking a challenge which was fairly open to it. Yet, there was no letter from it to the appellant or KTMB between 21 December 1994 and 13 January 1995 protesting either the validity or the *bona fides* of KTMB's notice of 21 December 1994.

Am I entitled to look at the surrounding circumstances for the purpose of ascertaining the intention of the parties in this case? I think that I am. And I find support for my view from the judgment of Sir John Pennycuick in *St. Edmundsbury & Ipswich Diocesan Board of Finance & Clark (No. 2)* [1975] 1 WLR 468, 477. When delivering the judgment of the English Court of Appeal in that case, Sir John Pennycuick observed as follows:

> Mr. Vinelott contended that the proper method of construction is first to construe the words of the instrument in isolation and then look at the surrounding circumstances in order to see whether they cut down the *prima facie* meaning of the words. It seems to us that this approach is contrary to well-established principles. It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression upon such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

The speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line v. Ynguan Hansen-Tangen* [1976] 1 WLR 989, also support the proposition I alluded to a moment ago.

I am conscious that we are here not construing the words of a contract embodied in a single document. We are more concerned with a set of facts and circumstances which, when taken together, points to the intention of the parties in relation to the effect that was meant to be given by them to a

particular transaction. But the general approach and result in either case must, in my judgment, be similar.

For the reasons I have expressed thus far, I am of the opinion that KTMB's notice of 21 December 1994 was valid and effectual to terminate the relationship of landlord and tenant in respect of the lease granted to the first respondent. All that remained in the hands of the first respondent on 1 January 1995 was the six months notice period.

It follows that the learned judge misdirected himself on the evidence before him. I do not think it fair to lay much blame at his door. For the parties before him at the trial had placed a number of issues not entirely relevant to the resolution of the dispute between them. Among these were included the question whether KTMB was or was not the agent of the appellant, which, as I earlier observed was one of the issues resolved by the learned judge against the appellant.

I am satisfied, had the learned judge addressed himself correctly to the totality of the circumstances and had asked himself what the parties really intended, he would have come to the same conclusion as I have in this appeal. At the end of the day it is the question of evidence and construction. Where he went wrong was in looking at the matter in a narrow fashion. Had he approached the question of construction in a broad and liberal fashion he would have realised that the parties intended the first respondent to have only six months notice period in their hands as of 1 January 1995.

That brings me to the second notice, the validity of which was attacked by Encik Azhar of counsel for the sixth and seventh respondents. The burden of his argument is that by the wording of the second notice, it did not have the effect of terminating the monthly tenancy, held by the first respondent after 30 June 1995. With respect, I am unable to agree with Encik Azhar. The language of the notice dated 31 July 1995 sufficiently complies with the law on the subject. It is settled and beyond question that a monthly tenancy period of the notice to quit, in the absence of a special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. See *Ko Teck Kin v. Watkinson* [1961] 2 MLJ 73.

The notice of 31 July 1995 makes it plain that the first respondent had to deliver up vacant possession on or before 1 September 1995. In my judgment that notice was sufficient to determine the first respondent's monthly tenancy as at 31 August 1995. The monthly tenancy having been validly determined, the first respondent and all those holding under him were trespassers and under an obligation to deliver up vacant possession to the appellant.

In my judgment the learned judge ought to have granted the relief claimed by the appellant in its writ in the second suit. Having come to this conclusion, I find it unnecessary to make any remarks touching upon the learned judge's failure to deal with the counterclaim. Since the notices to quit, which I have mentioned so often in this judgment, are valid, no question of success upon the counterclaim could possibly arise. For completeness, it should be dismissed with costs.

In the circumstances, the orders I propose to make are as follows. The appeal is allowed with costs here and in the court below, to be taxed and paid by the remaining respondents to the appellant. The first respondent's counterclaim is dismissed with costs. The orders of the learned judge are set aside. There shall be judgment for the appellant as prayed for in prayer (1) of the statement of claim. The deposit lodged in court shall be refunded to the appellant. Vacant possession shall be delivered forthwith.

Abu Mansor Ali JCA:

I have found this appeal difficult. But I agree with the judgment of my learned brother Gopal Sri Ram JCA that the appeal should be allowed and the counterclaim be dismissed for the reasons stated in his complete judgment. I too think that the whole case has to be viewed in its entirety and when one does that we counter the intention of the parties and that has been very well stated by my learned brother Gopal Sri Ram JCA. I agree with the orders he proposes to make on the appeal.

Denis Ong JCA:

I concur with the judgment of Gopal Sri Ram JCA and I also agree with the orders he proposes to make on the appeal. I have nothing to add.

Reported by WA Sharif